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No. 71-1273

In the Supreme Court of the United States

OCTOBER TERM, 1971

IRVING FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioner's father, Dr. Solomon Fried, underpaid his income taxes for the years 1944 through 1949. After extended litigation (see Pet. App. A, 12-14), judgment against Dr. Fried was entered for the government in 1960 in the amount of $191,032.99, representing the unpaid tax liabilities together with penalties and interest. The judgment was affirmed on appeal. *United States* v. *Fried*, 309 F. 2d 851 (C.A. 2). This judgment was partially recovered by foreclosure of a lien on certain insurance policies owned by Dr. Fried (Pet. App. A, 14). Further attempts by the government to reach other assets of Dr. Fried were unsuccessful (Pet. App. A, 14-18).

Thereafter, on August 11, 1967, the government instituted the present action against petitioner and the brokerage firm of Newburger, Loeb & Company, where petitioner maintained an account. The government's complaint sought delivery of the account assets, alleging that $174,997.48 and interest remained unpaid on its judgment against petitioner's father and that petitioner's brokerage account represented the proceeds of a fraudulent transfer to petitioner from his father (R. 6-7).[1] Withdrawals from the account were enjoined pending the outcome of the action (Pet. App. A, 18).

At trial, the government presented ample evidence to establish that the entire amount in petitioner's account represented direct and indirect transfers fraudulently made by his father at a time when Dr. Fried owed the United States substantial amounts on account of taxes, penalties and interest and was presumptively insolvent (Pet. App. A, 23-25, 26-30). The district court entered judgment against petitioner and ordered the brokerage account turned over to the government (Pet. App. B, 34-35). The court of appeals affirmed without opinion (Pet. App. C, 36-37).

2. Petitioner contends (Pet. 4-8) that the decision of the district court is invalid for failure to serve petitioner's father, the judgment debtor. However, New York law, which, as petitioner correctly notes (Pet. 6), is controlling, does not require service of

[1] "R." refers to the appendix in the court of appeals.

the judgment debtor where, as here, the judgment creditor seeks to recover assets which are no longer owned by the judgment debtor but rather have been fraudulently transferred by him to a third party. *Kineon* v. *Bonsall*, 194 App. Div. 110, 185 N.Y.S. 694, affirmed, 232 N.Y. 624, 134 N.E. 598.[2] Cf. *Buffington* v. *Harvey*, 95 U.S. 99, 103. Accordingly, failure to serve petitioner's father did not deprive the district court of jurisdiction to render judgment in this action.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[2] The decisions of inferior New York courts cited by petitioner (Pet. 7-8) are not to the contrary; they involved only actions to recover assets owned by or debts owed to the judgment debtor. In contrast, Dr. Fried, the judgment debtor here, signed an affidavit disclaiming any interest in petitioner's accounts (Pet. App. A, 16).

[3] Petitioner also suggests (Pet. 3) that the failure to serve Dr. Fried "results in an unconstitutional deprivation of property of the judgment debtor without due process of law." Assuming arguendo that petitioner has standing to make this argument, it is nevertheless forclosed by Dr. Fried's disclaimer of ownership. See note 2, *supra*. Furthermore, Dr. Fried, who was entitled to intervene (Pet. 7), chose not to participate in any manner even though he was fully aware of the pending action (Pet. App. A, 22-23).

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